IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.1446 OF 2005

M/s.Bharat Textile Engraving
Works : Appellants.

versus

The Municipal Corporation of
Gr.Bombay & Anr. : Respondents.

Mr.M.M.Vashi for the appellants.
Mr.J.J.Xavier for the BMC/Respondent NO.1.
Mr.D.R.Shah for Respondent No.2.

CORAM : D.G.DESHPANDE,J.

DATED : 26th October 2005.

ORAL ORDER

1. Heard advocates for the appellants, respondent No.1 and respondent No.2. The suit of the appellants came to be dismissed by the City Civil Court. The suit of the plaintiff was for challenging the notice under section 351 of the B.M.C. Act which was about unauthorised construction of wooden mezzanine floor

admeasuring 85’ X 45’ and unauthorised construction of separate units, subdivisions fully covered with wooden partition walls on ground floor etc. as described in detail in the said notice followed by sketch and map. It was the case of the appellants that all these partition and mezzanine floor were there in existence since 1945 when he became the tenant of the premises. That case of the appellants was rejected by the trial Court. Hence this appeal.

2. Counsel for the appellants firstly contended that, as laid down by the Division Bench of this Court in three judgments, no notice was given to the landlord and that was a material defect in procedure adopted by the BMC. The counsel for the appellant also conceded that no doubt the landlord was the party to the suit as defendant No.2. But, still according to him, giving of notice under section 351 of the BMC Act was mandatory and if that is not done, the entire procedure and process adopted by the BMC was required to be quashed.

3. Secondly, he contended that there was no cross examination of the plaintiff by the BMC and

in the cross examination conducted on behalf of the landlord only suggestions regarding the case of the landlord were put and, no attempts were made to shatter the evidence given in examination-in-chief by the plaintiff. Therefore, according to him, the evidence of the plaintiff has gone unchallenged. It was further contended by the counsel for the appellants that initially the plaintiffs had with him 8000 sq.ft. of area, out of which 1500 sq.ft. area was surrendered by him to the landlord and, in that surrendered area also there are mezzanine floor against which no action is taken by the BMC. Therefore, according to him, for the aforesaid reasons, the trial court was not justified in dismissing his suit and this appeal is fit to be admitted.

4. I do not find any substance in any of the submissions made by the counsel for the appellants. The question that was involved and the material aspect that the plaintiff was required to prove was the legality and validity of the structure and its existence in 1945, at any rate, prior to 1962 or any time before the notice under section 351. It was open to the

plaintiff to get the documents in this regard by calling upon the landlord to produce and prove the documents in his possession regarding approved plan and/or map of the disputed portion of the property or, he could have given notice to the BMC to produce the documents in its possession. He did nothing in that regard. He relied only upon the oral evidence. The trial Court was aware that there is no effective cross examination of the plaintiff by the landlord and no cross examination at all by the BMC. But even then the trial court was justified in disbelieving the entire evidence of the plaintiff because the factum of legality and validity and existence of structure for a long time, according to the plaintiff, since 1945, is not a fact that can be believed by the court only on the basis of oral evidence. Not a single document was produced by the plaintiff and the court was fully justified in dismissing his case. The approach of the court, that not giving the notice to the landlord under section 351 did not matter in the case because the landlord himself was the party to the suit, was also proper and correct. My attention was also drawn by the counsel for the BMC to the notice to show that in the notice

under section 351, though the name of the landlord was not there, the title shows that it is addressed to the landlord. But even if it is accepted for the sake of argument that notice under section 351 was not given to the landlord, that does not affect the legality of the steps taken by the BMC because the landlord was the party to the suit. The object of giving notice to the landlord may be to assist the occupants and to get the documents from the landlord about the structure for which the notice is given. That object is achieved when the landlord is made as defendant. So that does not come in the way of the Court in rejecting the suit of the plaintiff.

5. The third contention of the plaintiff about surrender of 1500 sq.ft. of area and the existence of mezzanine floor therein also does not help the plaintiff. There may be hundreds of illegal structures and surrounding buildings and they may be waiting for action by the BMC and that does not give legality and validity of the structure to the plaintiff. There is no merit in this appeal. The appeal is dismissed.

[D.G.DESHPANDE,J]

. When this order was pronounced and declared, the counsel for the appellant contended that as per the policy of the corporation the mezzanine floor can be regularized and, therefore, he should be given four weeks time to do so.

. This prayer is strongly opposed by the advocates for both the respondents on the ground that the entire building is likely to fall at any time and, therefore, no time can be given. Advocate for the BMC also tenders a notice dated 9.9.2004 about dilapidated condition of the building and calling upon the occupants and the landlord to vacate the same. This notice is also addressed to the present appellant. In view of this, the prayer is rejected.

[D.G.DESHPANDE,J]